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No. 97-371

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED
AUGUST 29, 1997
CERTIORARI GRANTED NOVEMBER 26, 1997

90 pp

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Docket No. CV90-5236 AWT(SHX)

FINLEY

v.

NATIONAL ENDOWMENT FOR THE ARTS

RELEVANT DOCKET ENTRIES

9-27-90	lpc	1.	COMPLT. ISSD SMS
11/29/90	js	6.	ANSWER to cmplt. defts
3/27/91	js	16.	FIRST A/C. pltfs
4/26/91	js	20.	ANSWER to 1st A/C. defts
6/9/92	mm	79.	Memorandum Opinion: concl: The crt DENIES dfts mot for jdmt on the pldgs, except withe respect to plts 2nd clm. Fur, crt GRANTS plfs mot for S/J on the 6th clm, on the grounds that the decency clause, on its face, is void for vagueness on the 5th amd & is aoverbroad under the lst amd. A separate jdmt shl be ent on the 6th clm.

6/9/92	mm 80.	ORD & JDMT: That dfts mot jfor jdmt on the pl gs is GRANTED as to the 2nd cause of actn of the 1st amd cmp. In all other respects, the mot is DENIED. The mot of the plfs for S/J on the 6th cause of actn of the 1st amd cmp is GRANTED. Fur Ord that dfts & all persons in active concert or participation with them who receive ntc of this ord are permanently enjoined frm enforcing said "decency" clause. (ENT 6/10/92) Mld cpys/ntc
8/7/92	dlm 92.	DFT FLD NTC OF APP TO THE 9th C/A FRM ORD/JGM FLD ON 6/9/92. FEES WAIVED. PTY SVC: THEODORE C. HIRT, MARK W. BATTEN: MARJORIE HEINS: MARY DORMAN: DAVID COLE: ELLEN YAROSHEFSKY: PAUL L. HOFFMAN: NAN D. HUNTER ON 8/19/92.
8/24/92	mm 9[5].	CRTS ORD: That dfts mot for entry of jdmt is GRANTED & a final jdmt under Rule 54(b) shl be ent on the 4th cause of actn. That crt shl enter a final jdmt under 54(b) on the 2nd cause of actn. PTC is cont to 10/26/92 @10am.
"	" 96.	CRTS ORD: That 2nd cause of actn of the 1st A/C is dism on the merits & plfs shl take nothing. On the 4th cause of actn of the 1st

		A/C a decl is ent in plfs fvr. Entry of sep jdmt. Purs to FRCP 54(b) the crt expressly determines that there is no just reason for delay & expressly directs the entry of this jdmt as a final jdmt. The award of costs & attys fees, if any, shl abide the final determination of the remaining clms in this actn. (ENT 8/27/92) Mld cpy/ntc by CRD S. Keir on 8/25/92.
10-23-92	cmh 105.	DFTS, NATL ENDOWMENT FOR THE ARTS & ANNE-IMELDA RADICE, FLD NTC OF APP TO THE 9TH CCA FRM JMT FLD 8-24-92 & ENT 8-27-92. FEES WAIVED. PTY SVD: THEODORE C. HIRT/ MARK W. BATTEN, AUSA STAN BLUMENFELD, MARJORIE HEINS, MARY DORMAN, DAVID COLE, ELLEN YAROSHEFSKY, PAUL L. HOFFMAN, & NAN D. HUNTER ON 10-29-92.
11/4/92	mm 109.	STIP & ORD: That dfts are enjoined to reconsider pplfs 1990 applic. A stay of inj pending app by the dfts & the outcome of the remaining clms in this case.
11/16/92	mm 110.	STIP & ORD: That dfts are enjoined to reconsider plfs 1990 applic. The Chair person of the Nat'l Endowment for the Arts shl present these applic to the Nat'l

			Council on the Arts at a regularly scheduled mtg of the Council, & obtain the collective recommendations of the Council to the Chairperson after the council has had the opportunity to review the applic & engage in a colle discussion to the extent deemed necessary. The Chairperson shl then act on the applic purs to 20 U.S.C. §954-55. A stay of the inj set out above pending app by the dfts. By stip to the entry of this inj, dfts do not waive their right to app frm the crts jgm on plfs 4th cause of actn or any other clm in this case.
1-4-93	pb	112.	DFTS, FLD NTC OF APP TO THE 9th C/A FROM ORD FLD 11-4-92 & 11-16-92.
6/11/93	mm	128.	STIP & ORD: Re sttlmt agreementThat dfts agree to pay to plfs Finley, Fleck, Hughes & Miller the sum of $252,000 in full & final sttlmt of plfs 1st, 3rd, & 5th causes of actn. Any clms by any of the plfs arising frm these causes of actn, or plfs 4th cause of actn shl be forever barred. (See doc for amt breakdown (ENT 6/14/93)
"	"	129.	CRTS ORD: That all remaining causes of actn w/i the juris of this crt (i.e., not w/i the jurisd of the CCA), to wit, the 1st, 3rd & 5th causes of actn are dism w/o prej for a period of 100 dys & shl thereafter be w/prej, unless a timely mot to reopen has been fld. Plfs may move to set aside these dism at any time w/i 100 dys for failure of dfts timely to tender the sttlmt sum. (ENT 6/14/93) MD JS-6 mld cpys/ntc
5/19/97	rm	132.	MO: filing & spreading the mandate of 9th CCA in chambers, cnsl notified affirming the decision of USDC on appeals filed 10/23/92 & 1/4/93. (ENT 5/21/97)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket Nos. 92-56028, 92-56040,
~~92~~-56055 and 92-56063

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES; TIM MILLER; NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; ANNE-IMELDA RADICE, IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS-APPELLANTS

RELEVANT DOCKET ENTRIES

8/24/92 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. * * *

12/3/92 Filed motion & order * * * On its own mtn the ct orders that 92-56028 and 92-56387 be consolidated. * * *

2/3/94 ARGUED AND SUBMITTED TO James R. BROWNING, Warren J. FERGUSON, Andrew J. KLEINFELD [92-56028, 92-56387, 93-55089] (dr) [92-56028, 92-56387, 93-55089] * * *

7/14/95 Filed order (James R. BROWNING, Warren J. FERGUSON, Andrew J. KLEINFELD,): The

parties are ordered to provide the court with supplemental briefs within 15 days of this order. * * *

11/5/96 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. James R. BROWNING, author; Warren J. FERGUSON; Andrew J. KLEINFELD, dissenting.) FILED AND ENTERED JUDGMENT. [92-56028, 2-56387, 93-55089] (hh) [92-56028, 92-56387, 93-55089]

12/23/96 [3141687] Filed Original and 40 copies Appellant Natl. Endowment for the Arts' petition for rehearing with suggestion for rehearing en banc * * *

1/30/97 Filed order (James R. BROWNING,): Appellees are requested to file a response to appellants' petition for rehearing and suggestion for rehearing en banc.

5/1/97 Filed order FOR PUBLICATION (James R. BROWNING, Warren J. FERGUSON, Andrew J. KLEINFELD,): A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. FRAP 35. The petition for rehearing is DENIED and the suggestion for rehearing en banc is

REJECTED. O'SCANNLAIN, Circuit Judge, Joined by KOZINSKI and KLEINFELD, Circuit Judges, dissenting from order rejecting suggestion for rehearing en banc . . (see order for full text) [92-56028, 92-56387, 93-55089] (hh) [92-56028, 92-56387, 93-5509]

5/9/97 MANDATE ISSUED. Costs taxed against appellants in the amt of $237.00 [92-56028, 92-56387, 93-55089] (hh)

MINUTES OF THE DECEMBER 1990 RETREAT OF THE NATIONAL COUNCIL ON THE ARTS

The Hay Adams
One Lafayette Square, N.W.
Washington, D.C.
December 14 & 15, 1990

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At the hundred-and-fifth meeting of the National Council on the Arts, the Council unanimously voted to hold a retreat to analyze issues generated by the 1990 legislation reauthorizing the Arts Endowment. The following is an account of that retreat.

Note: This group came together as a deliberative body of the Council and, as such, did not enact or create policy during the retreat.

[11]Decency Provision

Ms. Davis offered three proposals for the consideration of the Council which she believed satisfied the statutory requirement that applications be judged taking in consideration general standards of decency. All proposals were based on the premise that general standards of decency must be discussed in the context of artistic excellence and the protections afforded by the First Amendment of the Constitution.

Proposals

1) General standards of decency would be applied by grant-review panels as a matter of course because each panelist brought to the table their community's standards of decency and this would become part of the deliberative process.

2) In addition to standards of decency being applied by diverse panel representation, a copy of the Endowment's legislation would be provided to panels along with an oral presentation by staff, and

3) Language referencing the context of general standards of decency would be inserted within the Endowment's statement of purpose in all guidelines.

Note: The language would provide a contextual interpretation of general standards of decency within the Endowment's mission, it would not serve as guidelines on decency standards.

O-MT Panel Statement

A statement regarding the decency provision was prepared by the Opera-Musical Theater Overview panel and read by Ms. Bliss (Appendix D):

"The Opera-Musical Theater Program Overview panel reiterates in writing our unanimous objection to any reference or inclusion of Congress' so-called 'decency clause' in the 1992-93 application guidelines. Standards of decency are subjective, indefinable, and irrelevant to the consideration of artistic excellence, which is the primary concern of this panel and the National Endowment for the Arts."

Council members questioned whether or not actual language referencing general standards of decency was perceived as a Congressional requirement.

[12] Ms. DiNapoli believed Congress did not intend for language to be placed in Endowment guidelines.

Motion

After a brief discussion, Mr. Kingston made a motion to accept option one, and that strengthening the diversity of panels took care of the issue of general standards of decency. Motion was seconded by Ms. Luers and was passed by a unanimous vote

Education Program Provisions and Initiatives

Statutory Requirement	The new legislation contains a statutory requirement mandating that any time the Endowment's appropriation exceeds $175 million, fifty percent of the increase must go into the Arts in Education Program. As voiced by several Council members, discussing a mandate which specifies how to spend funds not yet available to the agency is a difficult task. However, some philosophical points were raised about the use of current funds which would impact increased spending in the future.
Inclusiveness	o In order to meet the mandate of increasing accessibility to the arts through providing education to all Americans, including diverse cultures and urban and rural popu lations, Messrs. Johnson and Gar fias underscored the need for the Endowment to proactively work with all States. Therewas concern over some States not receiving funding due to poor grantsmanship. Additionally, the concept of educa tion must be an agencywide con cern. Note: Mr. McAusland assured members this was being done and talked about the Endowment's internal working group on Arts

	Education which is addressing these issues.
Model Projects	o Funding model projects was suggested by Ms. Curtin. This would enable the Endowment to con sistently commit funds, over the long term, to affect [sic] change in the field of arts education. Note: Ms. Curtin felt the uncertainty of additional funds for Arts in Education, given the uncertainty of appropriation levels, would have an adverse effect on across the board educational initiatives no longer supportable due to fluctuating appropriations. Mr. Johnson thought the concept of funding model education projects in rural and inner city areas, with a reporting requirement on the number of new people reached, worth exploring.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 90-5236 AWT (Kx)

KAREN FINLEY, ET AL., PLAINTIFFS

v.

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.

Date: December 16, 1991
Time: 10:00 a.m.
Dept: A. Wallace Tashima

PLAINTIFFS' STATEMENT OF
UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW

Pursuant to Local Rule 7.14.1 of this Court, plaintiffs present the following statement of uncontroverted facts as to which there is no material issue, and proposed conclusions of law, in support of their accompanying motion for partial summary judgment.

Statement of Uncontroverted Facts

1. In 1990, Congress amended 20 U.S.C. §954(d), which governs National Endowment for the Arts (NEA) grants. That statute now reads, in pertinent part:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures [compliance with which is required prior to any payment being made under this section], the Chairperson shall ensure that
>
> > (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public. . . .

20 U.S.C. §954(d). This provision will be referred to herein as the "decency" provision.

2. Defendants are charged with enforcing and implementing the above language in judging all applications for NEA funds. 20 U.S.C. §954(d).

3. In December 1990 the National Council on the Arts voted to adopt a statement that "[g]eneral standards of decency would be applied by grant-review panels as a matter of course because each panelist brought to the table their community's standards of decency and this would become part of the deliberative process." Minutes of Retreat of National Council on the Arts, Exhibit 1 to Amended Complaint.

4. Defendants have not issued any regulations or instructions defining the meaning of "decency" in the challenged provision.

5. The then-General Counsel for the NEA, Julianne Ross Davis, has stated that "general standards of decency is a very slippery, very broad, and very vague standard." Transcript of Retreat of Na-

tional Council on the Arts at 104, Exhibit A to Declaration of David Cole.

6. The Opera-Musical Theater Overview Panel of the NEA stated that "Standards of decency are subjective, indefinable, and irrelevant to the consideration of artistic excellence." National Council on the Arts Retreat Minutes at 11-12, Exhibit 1 to Amended Complaint.

7. Defendant John Frohnmayer has stated that "no one individual is wise enough to be able to consider general standards of decency and the diverse values and beliefs of the American people all by him or herself." Department of the Interior and Related Agencies Appropriations for 1992, Hearings Before the subcommittee on the Department of the Interior and Related Agencies of the Committee of the House Committee on Appropriations 234 (Feb. 21, 1991).

8. In judging applications for NEA funds, the NEA considers an applicant's past record as well as future potential. NEA Application Guidelines for Fiscal Year 1992 Theater Grants at 1, 15, Exhibit B to Declaration of David Cole; Frohnmayer, Talking Points for Community Forum Public Meeting, Ivar Theater, Los Angeles, CA, January 24, 1991, at 3, Exhibit C to Declaration of David Cole.

9. Some NEA grants are awarded on a matching basis, and in these instances the "decency" provision applies to funding from non-federal sources. The Independent Commission, A Report to Congress on the National Endowment for the Arts 32-34 (Sept. 1990).

10. Plaintiffs Holly Hughes, Tim Miller, John Fleck, and certain members of NAAO have applied for

or intend to apply for NEA funds, and therefore their applications, including their past and current work, will be subject to the "decency" provision. Plaintiffs Hughes, Miller and Fleck create artwork that addresses controversial issues of sexuality, particularly homosexuality, and power. They were singled out by critics of the NEA and the NEA itself during 1990 because of the controversial content of their work. The fact that their work will be judged under the "decency" standard has chilled and deterred their freedom of expression, and continues to do so. Declarations of Hughes, Miller, Fleck, and Murphy.

11. Plaintiff Finley and certain other members of NAAO have been deterred from applying for NEA funds by the "decency" provision. But for the provision, they would apply for and would be eligible to compete for NEA funds. Declarations of Finley, Murphy.

12. Plaintiffs Hughes, Miller, Fleck, and Finley were singled out by critics of the NEA and the NEA itself during 1990 for creating controversial or indecent art work. See NEA documents attached to Declaration of Sobel. Each artist openly addresses controversial issues of sexuality in their work. Declarations of Hughes, Miller, Fleck, and Finley.

13. Plaintiff NAAO has had to devote significant resources to addressing the chilling effect of the "decency" provision on its members. Declaration of Murphy.

Proposed Conclusions of Law

1. This Court has jurisdiction over this action.
2. Plaintiffs have standing to sue.

3. The "decency" provision of 20 U.S.C. §954(d)(1) is unconstitutionally vague in violation of the First and Fifth Amendments to the United States Constitution.

4. The "decency" provision of 20 U.S.C. §954(d)(1) violates the First Amendment because it restricts the rights of NEA grant recipients to express themselves freely on their own time and with non-federal funds.

5. The "decency" provision of 20 U.S.C. §954(d)(1) violates the First Amendment because it draws an impermissible viewpoint- and content-based line in a context requiring government neutrality.

DATE: November 1, 1991 Respectfully submitted,

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By: /s/ DAVID COLE
DAVID COLE
Attorneys for Plaintiffs

DECLARATION OF CHARLOTTE MURPHY

I, Charlotte R. Murphy, do hereby declare as follows:

1. I am the Executive Director of the National Association of Artists' Organizations (NAAO), which is a plaintiff in this case. NAAO is a national nonprofit association of individual artists and artists' organizations, including art galleries and performance spaces. It currently has 253 individual members and 358 organizational members.

2. NAAO is dedicated to serving and promoting nonprofit organizations engaged in the presentation and support of new and contemporary work in the visual, performing, literary, media, and interdisciplinary arts. Organizations that belong to NAAO have presented and supported the work of many people who are now recognized as among the major artists of our time, including Meredith Monk, Laurie Anderson, Julian Schnabel, Cindy Sherman, and Robert Mapplethorpe.

3. Among NAAO's objectives is to fight laws that burden its members' freedom to create and display new art. NAAO joined this lawsuit in March 1991 specifically to challenge the "general standards of decency" requirement that was added to the National Foundation on the Arts and Humanities Act in December 1990.

4. New and contemporary art of the type presented or created by many NAAO members is by definition often provocative and threatening to traditional or conservative values or notions of morality. It often addresses issues of sexuality, gender, and sexual politics. Therefore, NAAO members are afraid

that the "general standards of decency" requirement will bar then from receiving NEA funding. While no one can know with certainty what is or is not barred by this extraordinarily vague standard, the artists most vulnerable to its vague language are those who, like NAAO members, present or create provocative and controversial art. The following are two examples of such art; they are representative, but not exhaustive.

5. The Franklin Furnace Archive, Inc., a NAAO member located in New York City, is a museum and gallery that collects and exhibits contemporary multidimensional art forms. Franklin Furnace houses one of the largest collections of art books and other publications, over 10,000 volumes, devoted to underground and alternative art movements. Many of the artistic images contained in this collection are sexually explicit, and might be considered inconsistent with "general standards of decency."

6. Moreover, Franklin Furnace frequently exhibits the work of artists whose themes include sexuality. Among these artists are practitioners of "appropriationism," a major movement in art photography and painting in the last decade or so. David Salle, a well-known painter whose work has been shown at Franklin Furnace, often "appropriates" existing photographs taken from sexually explicit publications such as Hustler or Screw, but explores the subject in aesthetically different ways than the original photographs. Nonetheless, with the concept of "indecency" undefined in the statute, such images could be found to violate that standard solely because of their subject matter.

7. As another example, the Visual Studies Workshop (VSW), a NAAO member located in Rochester, New York, exhibits new and contemporary works of visual art and also publishes a monthly journal of criticism and arts reportage called Afterimage. Afterimage regularly prints photographs, films and video stills, and other images to illustrates its articles. Because a large number of contemporary visual artists are exploring topics of sexuality, many of the images reproduced in Afterimage, as well as the works exhibited by VSW, might be considered "indecent."

8. NAAO has members who would be eligible to and would in fact apply and compete for NEA grants but for the "decency" requirement. These individuals will not agree to reveal their identities because they fear that becoming publicly identified as challenging the "decency" requirement will lead to adverse publicity and denials of future funding. These individuals include:

(a) A poet whose themes include cultural rebellion, who is also the administrator of a major poetry venue in New York City. He has been widely published and has received many grants and awards.

(b) A performance artist and arts administrator in the Midwest whose works deal specifically with issues of sexuality and gender, and who employs nudity in his performances. He has for years been a member of the faculty at two of the most prominent art schools in the midwest.

9. Other well-known artists who are not NAAO members have been prevented from applying for NEA funding because of the "decency" requirement. For

example, Joseph Papp, for more than 35 years director of the New York Shakespeare Festival in New York City, which operates the Public Theater, has stated that he would not apply for NEA grants so long as the "decency" requirement remained in effect.

10. NAAO also has numerous members that have applied for NEA funding despite the "decency" requirement but that are chilled in their applications and in the scope of their projects by uncertainty about what the standard means or how to comply with it. These members include organizations that consistently present performance art, theater, music, dance, poetry, or installation work (site-specific visual art) that address the fundamental human concerns of sexuality, gender, sexual violence, homosexuality, and society's response to the AIDS crisis.

11. These NAAO members are harmed by the "decency" requirement because it may disqualify or disadvantage meritorious applications from organizations that have presented art dealing with sex or homosexuality, nudity, violence, or other highly-charged and provocative issues. If these organizations are denied NEA funding because the work that they have presented or seek to present is deemed "indecent," they will suffer additionally because frequently private grantsmakers rely on the NEA's judgments in deciding whether to supply additional funds. On the other hand, if the organizations do receive funding, they are subject to continuing oversight by the NEA to assure compliance with the "decency" amendment.

12. Among the NAAO members in this category are:

(a) A major arts organization in New York City that presents important new experimental performance art, music, theater, poetry, and installation work in public spaces such as beaches, parks, empty warehouses, and other buildings.

(b) A publication in Los Angeles that deals with performance art and has featured articles on the work of plaintiff Tim Miller and other prominent performance artists. This publication, in the course of reporting on and reviewing performance art, uses both words and photographs that could be considered "indecent."

(c) A multidisciplinary art gallery in Chicago which features performance art, painting and sculpture, and off-site work dealing with sexuality.

(d) A gallery in San Francisco devoted to paintings, photograph, sculpture and prints, often with sexual themes.

(e) A major gallery and performance space in New York City which has in the past featured the work of such prominent artists as Karen Finley, David Wojnarowicz, and Nan Goldin, whose works deal with sexual themes and have been the subject of previous political attacks on grounds of "indecency."

These organizations will not agree to reveal their identities because they fear that becoming publicly identified as challenging the "decency" standard will lead to adverse publicity and denials of future funding.

13. The "decency" requirement has a particularly adverse effect on individual and organizational NAAO members who apply for grants. Because artists develop themes, styles, and subjects of concern in an integrated manner, they cannot segregate their work into categories of "decent" and "indecent." The NEA's review of an artist's grant application is based on the entire body of her previous work. An artist whose work in the past might be considered "indecent" is thus less likely to receive a grant today because of the decency requirement. An artist who does receive NEA funding, subject to the decency requirement, will be inhibited in all of her work during the grant period because of the NEA's continuing oversight.

14. In addition to harming NAAO's organizational and individual members, the "decency" requirement also harms NAAO itself. NAAO has had to devote time, energy, and resources to advocating against the decency standard, assisting its members in responding to the standard, and participating in this litigation.

15. The "decency" requirement has already had a chilling effect on grant applications and on the NEA's ability to fulfill its role as a promoter of what is most original and significant in contemporary art. At the recent meeting of the National Council on the Arts on August 3, 1991, which I attended, a member of the visual arts fellowship peer panel reported that this year's applications were disappointing because as a group they presented work and ideas that were much less imaginative and challenging than in previous years. Similarly, a number of other individuals who serve on peer review panels in the areas of performance and visual arts have told me that the applications this year reflect significantly less concern with gender and sexuality and are tending to address "safer issues."

16. The "decency" amendment has also caused the NEA to monitor the use of grants in ways that are chilling artistic freedom and intimidating grant recipients. For example, the NEA recently demanded recoupment of funds from a dance and performance arts space in New York City, a NAAO member, that devoted one issue of its newsletter to the theme of gender (i.e., masculinity or femininity, rather than biological sex) as a system of "social codes and gestures" that constitute a kind of performance or theater. The issue was illustrated with photographs that included images of nudity, cross-dressing, and transsexuals. In another incident, the NEA investigated the use of grant funds by another NAAO member, a gallery in San Diego, for a public art project whose theme was police brutality. Although the NEA found that the project fully conformed to agency guidelines, it announced that it would be revising those guidelines so that they would in the future prohibit art projects that address "a specific advocacy issue."

Signed under the pains and penalties of perjury this __ date of September 1991.

/s/: CHARLOTTE R. MURPHY
CHARLOTTE R. MURPHY

DECLARATION OF DAVID COLE

1. I am one of the attorneys for plaintiffs in Finley v. National Endowment for the Arts, No. CV 90-5236 AWT (Kx). I submit this declaration to identify the documents attached hereto as exhibits in support of plaintiffs' Motion for Partial Summary Judgment. All of the exhibits were created by defendants, and all but Exhibits B and D were produced to us by defendants in discovery.

2. Exhibit A is a portion of the Transcript of the December 1990 Retreat of the National Council on the Arts.

3. Exhibit B is selections of the Fiscal Year 1992 Application Guidelines for Theater Grants. This is a public document.

4. Exhibit C is a document entitled "Talking Points: Community Forum public meeting, Ivar Theater, Los Angeles, CA—January 24, 1991," and consists of talking points for an address by defendant Frohnmayer.

5. Exhibit D is a document entitled "Addendum E," and sets forth terms governing organizations receiving NEA support for subgranting. It was provided by an organization receiving NEA support for subgranting.

6. Exhibit E is a document created by Julianne Ross Davis, then-General Counsel to the NEA, entitled "Constitutional Analysis of the FY90 Appropriations Obscenity Language."

7. Exhibit F is a January 31, 1990 Memorandum from Jessica Andrews, then-Director of the NEA's Theater Program, to the Theater Advisory Panel.

8. Exhibit G is a document entitled "Talking Points for 1st Amend. Congress, KC, MO 4/19/91," and consists of talking points for an address by defendant Frohnmayer.

I declare under penalty of perjury that the above is true and correct to the best of my knowledge, information and belief.

DATED: October 4, 1991

/s/ DAVID COLE
DAVID COLE

Exhibit A to Cole Declaration

* * *

(Recess.)

MR. MANDLE: We now move on to some rather important business that I'm going to ask Julie Davis to get into by describing the issues from the legislation concerning the decency provision that has been inserted there. And then we can have our discussion go from there.

OVERVIEW OF NEW LEGISLATION RESUMED

MS. DAVIS: Okay, as you all know our re-authorizing language has included a reference to decency. Basically, the legislature says that we shall that artistic affluence and artist matter are the criteria by which applications are adjudged. And then there was a caveat—taking into consideration general standards of decency and respect to the diverse beliefs and values of the American public.

This is a provision that has been approached and thought about and discussed with great care. I have spent probably the vast majority of my working time since October 11th trying to puzzle through this and in doing so I have consulted a great many people. I have consulted legal scholars, constitutional law scholars. I have discussed it with lawyers of every ilk and concern and I have also spoken with people within the Endowment trying to figure out what is the best way to approach this.

Now general standards of decency is a very slippery, very broad and very vague standard. The term decency defines definition and when taken out of context has no definition and when taken out of context has no definition. That is the conclusion that I have

reached and that it only has definition when it is taken in the context of artistic excellence and also surrounded with the protections afforded by the First Amendment of the Constitution.

With all of my discussions and all of my thoughts we have come up with three proposals for you to discuss. I have received other suggestions from other sources and have rejected them for one reason or another. But the three proposals that I'm going to put in front of you today are the proposals that I think meet the statutory requirement and are legal and within the confines of the Constitution.

The first suggestion that I would offer to you is that we approach this problem on a procedural plan. In other words, later in our legislation when it directs us to ensure that our panels are represented in a diverse manner both geographically, ethnically, minority, aesthetic point of view, that that is the way in which we achieve this goal and in other words, we make sure that we have a very well represented panel.

When those people come to Washington to do their deliberations either Randy or John or myself will visit each panel and we will answer their questions as to how they are supposed to take general standards of decency into consideration. The instruction that they will receive is that you represent a very diverse part of the United States. You represent very many different backgrounds. Your ethnic backgrounds are different. Your geographic backgrounds are different and that general standards of decency is something that cannot be one opinion. It means you have to have opinions and you have to have considerations from a wide variety of people, backgrounds, points of view in

order to also take into consideration the diverse beliefs and values of the American public.

So the basic instruction that the panels receive in fact by virtue of your backgrounds and by virtue of your diversity you represent the general standards of decency and the discussions that you make and the deliberations that you engage in bring with you your standards. You bring with you your general standards of decency from your communities, from you backgrounds, from your ethnic backgrounds, and that is how we deal with it.

There is a second way. Essentially we would take the same approach as to—essentially on a procedural basis by ensuring that our panels are well represented. It's where we get to the general standards of decency and the respect for the diverse beliefs and values of the American public. In addition, when the panels come to Washington we would give them a copy of our legislation and again speak with them at the beginning of each panel meeting. Explain to them that we think that general standards of decency can only have meaning in the context of artistic excellence and in the context of a consideration of the diverse beliefs and values of the American public.

The fourth way is again through a process ensuring that our panels are very diverse and widely represented. And I passed around an example of our guidelines. Each of you have a copy of it. It's just a sample but I gave it to you to see where this third proposal would be inserted.

And basically at the beginning on page 1 there is a preface and then there is a statement called statement of mission—National Endowment for the Arts

and then a preamble. And the preamble is basically saying what the Endowment is all about, what our mission is, where we're trying to go and what we are trying to accomplish in our grant making process.

Below that there is a subheading missions and it says the mission of the National Endowments for the Arts is to foster the excellence, diversity, and vitality of the arts in the United States and to help broaden the availability and the appreciation of such excellence, diversity and vitality. All this would remain the same. There have been some changes that I have been working with people on the preamble.

Now if you turn to page 2 you see a subheading that says What and there are a series of bullets there. Then if you turn to page 2 of the insert that is provided you will see that there is a What and there is a series of bullets. Then if you turn to page 3 the bullets continues. I have added a paragraph prior to the subheading, how, and this is the way that we would address the general standards of decency. I read it to you.

No single consideration is determined here and this list is by no means exclusive. Rather this is a list we pledge considerations informing the ultimate aesthetic judgment by the National Endowment for the Arts regarding an application, artistic merit and artistic excellence. The National Endowment for the Arts ensures that its panels are representative of the diverse view of the American public. Each panel to the extent possible is composed of individuals of diverse ethnic, geographic and aesthetic backgrounds and is fairly balanced gender wise.

In so doing the Endowment ensures that within the framework of constitutional protections of freedom of speech, expression and religion that general standards of decency are considered to avoid the funding of works that are obscene and thus are without artistic merit and are not protected speech.

Those are the three proposals that I have to present to you. Like I said I have received other suggestions and I am open to suggestions today, too, but these are the three that I have settled on that will meet the statutory requirements and at the same time maintain our mission to foster the very best and the most excellent of art in America.

MR. MANDLE: Sally?

MS. BLISS: Roger, I would like to present a statement. I attended and observed the Opera Musical Theatre panel meetings for 2 days in the beginning of December. And they presented me with this statement I think I should read right now.

The Opera Musical Theatre Program Overview Panel reiterates in writing our unanimous objection to any reference or in conclusion of Congress so called decency clause. That's in quotes. In the 1992-93 application guidelines standards of decency are subjective and definable and irrelevant to the consideration of artistic excellence which is the primary concern of this panel and the National Endowment for the Arts.

We have vehemently opposed and avoided any consideration of "decency" as a funding criteria during our deliberations and, therefore, we disassociate ourselves from the addition to the guidelines of any language referencing this issue after our panel has

adjourned. And it's signed by the overview panel panelists.

And I have one for everybody if you would like to pass them around.

MR. MANDLE: I might add that in this memorandum that John received and that we were also sent—although I guess I'm the only person here who has such a copy. There is in their statement, dated December 12, also a group of three statements in opposition to the inclusion of any reference of consideration of general standards of decency in the application guidelines. So I will pass this around to you.

And there may or may not be others. I am only simply dealing with what has been put in front of me.

MR. GARFIAS: Roger, I forget who was that memorandum from?

MS. LUERS: Mine is Opera Musical Theatre.

MR. MANDLE: Mine is Playwrights Fellowship panel.

MS. LUERS: May I ask Rose a question?

MR. MANDLE: Yes.

MS. LUERS: Rose, from your best guesstimate how would you think the Congress would respond if at all if there was not a decency statement in our guidelines?

MS. DI NAPOLI: Well, there are 535 members of Congress. I think many of them have to review this and I don't really think I can make that judgment.

MS. LUERS: Do you think some of those 535 members of Congress will create a problem if we did not have decency in the guidelines?

MS. DI NAPOLI: A very small number. Just probably our critics will jump on it, but I don't think it was the intention of the managers of the legislation that there be something in writing in our guidelines —any kind of definition of decency and that at least the staff of principals at work on this bill have indicated that.

MS. LUERS: So therefore if we were to remove the decency from the guidelines, you do not foresee that we would face any enormous political challenge to the National Endowment for the Arts?

MR. FROHNMAYER: Well, they're not in there, Wendy. What we're asking you for is advice as to how we can treat this issues. It's not a question of removing our heads about the 1990 grants and I have a letter from Billy Tisch here which WNYC has just turned down their 1990 grant because the language was not removed. Is it appropriate that we have a discussion about that at this time?

MR. FROHNMAYER: Well, those matters are in litigation at this time and it is a public meeting. It is not my preference to do that.

MS. LUERS: But John, if you remove it retroactively then the litigation goes away.

MR. FROHNMAYER: Not necessarily.

MS. LUERS: Why not?

MR. FROHNMAYER: I have been a lawyer from a long time and I have never given legal advice in a

public meeting unless I was asked to and being paid for that.

(Laughter.)

MR. MANDLE: Talbot?

MS. MACCARTHY: Getting back to what we are discussing. We had a proposed motion and a couple of comments but I don't think as a group we really have gone on the line to say that we think option 1 is the one—if we all do that that's what we would recommend that the chairman follow. I think we should be somewhat official about that. That's a pretty big decision.

MR. GARFIAS: Are we a formal league constituted body?

MS. MACCARTHY: Or a straw vote?

MR. MANDLE: We can certainly take a vote to recommend that out of this session and I would think that over the course of the next 2 days we are going to sharpen our focus on a lot of these issues and want to make recommendations that we do vote on them as a retreat body considering things for the council.

MS. MACCARTHY: I think we should so that John really know that we are all in agreement and it seems that we are.

MR. MANDLE: Well, let me ask the question, are we ready then to make recommendation about this issue as sooner we can off the dime and do it.

(General Ayes.)

MR. MANDLE: Do you want to frame that as an official motion?

MR. KINGSTON: Then I frame it as an official motion, seconded by Randy that we take option number 1 which is to strengthen the panels and the diversity that we have discussed carefully this morning and make no verbal reference, no written reference to the issue of decency within the guidelines.

MR. MANDLE: Because it was taken care of?

MR. KINGTON: Because it is taken care of procedurally and through the Constitutional Bill of Rights which is an implicit rule of behavior for all of us.

MR. MANDLE: Is there a second to that?

MS. LUERS: I second that.

MR. MANDLE: Any further discussion?

(No response.)

MR. GARFIAS: Question: All those in favor? Ayes.

(A show of hands.)

MR. MANDLE: Opposed?

(No response.)

MR. MANDLE: Abstentions?

(No response.)

MR. MANDLE: It is carried.

MR. FROHNMAYER: Well, I would say this to you ladies and gentlemen, we will I think follow that advice and it is my view that although I am by the

statute required to ensure this, that that insurance can only come through this procedure of wide representation on the panels and the National Council. So there will not be a case that I would impose my own judgment once the panels and council have made those decisions. In other words I am not going to be the decency tzar here. I am going to count on these procedures to fulfill that mission in so far as it's required of us.

Exhibit B to Cole Declaration

Exhibit B. Fiscal Year 1992 Application Guidelines for NEA Theater Grants

[Exhibit B cannot be readily reproduced in this format. Copies will be lodged with the Clerk of the Clerk.]

Exhibit C to Cole Declaration

TALKING POINTS: Community Forum public meeting, Ivar Theater, Los Angeles, CA—January 24, 1991

I've been asked to talk about the year (or so) of crisis at the National Endowment for the Arts, and what I think the agency did right and what I think went wrong.

This past fall the National Endowment for the Arts was reauthorized, and although the final bill was a compromise that did not fully please everyone or perhaps anyone, the agency received a three year lease on life. That's half of the good news. The other half is that the content restrictions in place in 1990 were replaced by some wise statesmen with language that places the question of obscenity with the courts.

There are two other major portions of our new bill which bear mentioning this evening. First of all, more money will be granted directly to state arts agencies—by mandate. Some people in the arts community think this means less money for artists or arts organizations, and I would just express my confidence in the states to use these additional funds in a wise, responsible manner that ensures the continued success of the arts in their states. This reprogramming means shifting some of our funds from different discipline programs to meet the increase in direct funding to the states, but together with our public and private partners, we will find the money necessary for support of excellent art and creativity. In fact, we'll have to call upon our own creativity to make it

happen, but ultimately, the best art will survive and prevail.

Second, there is a provision which states that we must take into account general standards of decency and respect for the diversity of the American people in our grantsmaking process. This so-called "decency standard" has quite a few people worried, but I should point out that it is couched in positive language rather than a negative standard. Congress consciously used the language of decency rather than indecency, and although I cannot speak for their motivation, it may have been a result of Congress's and our revulsion to the negative attacks on art.

We are addressing this problem by making sure that our panels and National Council on the Arts are composed of decent citizens, people who recognize the plurality of our society, respect individual dignity, spiritual values, and the rights of all groups and their cultural expressions. This is what being a decent American is all about, and the roots of such beliefs go back to Jefferson and Thomas Paine.

What does this all mean to artists, and what does this say about the question of censorship?

In the most general sense, the answer is that artists and organizations who apply to the National Endowment for the Arts will be judged on the basis of the criteria which have existed since the very beginning of this agency. As many of you know, our panels are asked to make recommendations on the basis of an applicant's demonstrated past success and the potential—as outlined in the application proposal—for

artistic excellence. That's always a tough call, a subjective one, but the peer panel system is the best way to make these decisions.

Now, a word about the panels, particularly in relationship to how they are composed and what role they play in the decision-making process. Nominations will continue to be solicited from all corners for artists, critics, administrators and other professionals in the arts, and all panels will include an lay person who does not make a living from the arts, but nevertheless has a serious interest in the arts. We decided to add a lay person to make the panels more representative of our patrons—the American taxpayers—and to make the panels more accountable. A lay person brings a different perspective to the table, asks different kinds of questions. I think the main advantage of this addition is that it will, in some cases, force the panels to explain in detail why a particular project should be funded. One thing we must do better is to explain why we fund particular works—what makes the proposal have the potential for excellence and/or access to the arts. As I mentioned before, we are optimistic that explanation of the decisions of decent men and women about their subjective evaluation of proposals will fulfill the so-called "decency standard."

I should also mention that while the panel recommendations are basic to our process, the National Council on the Arts will continue to have the role of oversight of all grants, future directions of policy and funding-decisions, and recommendations to the Chairman. On a few occasions, the Council may reverse a panel recommendation on a number of

grounds, and the Chairman will also continue to have the responsibility of running the agency and making the final decisions on all of these recommendations. I want to emphasize that while their may be disagreements from time to time about the potential for artistic excellence, I do not believe in using the Council or the Chairman as a way to abridge freedom of expression or control the content of the applications.

Finally, on this issue, I am grateful to the Members of Congress who worked out the compromise. Six, seven months ago we were teetering on the brink of something much worse. Republicans and Democrats hammered out a bill that removed content-based restrictions, extended the life of the agency for the next three years, and slightly increased the budget for our work.

We must all face the fact, however, that there are some problems that need attention. First of all, there is the continued impression among some Members of Congress and certainly a portion of the public that all that the arts are about is causing controversy for controversy's sake. We need to reach out, to explain, educate, inform, and include more of our citizens in the cultural life of their communities. That's priority one.

The extensive coverage this debate has received has caused a great deal of rancor. Artists are upset with politicians and the public for the seeming refusal to listen and furthermore the attempts to fetter freedom of expression; the politicians and the public are quite frankly pissed off at some artists for what they see

as an attack on values and morality. I feel that both sides must do the most difficult thing: to listen and respect the other person's opinion. We must learn to let the vigorous clash of ideas—that most basic of American democratic principles—decide the direction we as a nation will go, decide how we're to solve our problems and address the needs and concerns of the minority, and, indeed all people.

Art will continue to pose questions about ourselves. We must listen to those questions. There is something about the arts that presses issues forward; the artists are the watchers of our society, to use Kurt Vonnegut's phrase, they are the canaries in coal mines, telling us about the conditions of our world; artists are commentators on society, and they do push —sometimes in ways which may not give us comfort. But in so doing, they allows us to confront the issues of our day and hopefully resolve them.

So let us not rush to conclusions without confronting works we haven't seen. Let us listen to our artists, see the performances, read the books, go to the shows. And let our artists maintain their vigilance as watchers. We should value their contributions more than we do, for they help us discover ourselves.

Finally, we should keep our sense of humor and perspective when it comes to so-called controversial art.
JOLLY GREEN GIANT STORY

If there is any salvation of our society, it is to maintain our sense of humor. Reinhold Niebuhr called humor the prelude to faith, and laughter the beginning of prayer. So with humor, with humility,

with dedication to public service, we at the National Endowment for the Arts will continue our mission to promote excellence in the arts and access to that excellence.

Our priorities at the agency cut across the spectrum of the arts. In the coming year, we will turn our attention to several areas of concern, including arts education, access to the arts (particularly in rural and underserved areas), and inclusion of all forms of cultural expression in our funding schemes.

The ultimate goal of our efforts is to help create and sustain a citizenry that:

> recognizes and appreciates the life-enhancing values of all art forms;
>
> feels free to give expression to their own innate creativity and humanity through participation in the arts;
>
> provides active support for the arts in both the private and public realms.

To build this kind of stewardship of our nation's culture, we must begin by educating all Americans about the fundamental value of the arts in our lives. We will continue to do so through our regular programmatic areas, especially Arts in Education, and also through our advocacy efforts.

That's why I'm here tonight. Not only to tell you about the Arts Endowment and where we stand in January, 1991. But to listen—to the needs of Los Angeles. As part of our outreach efforts, we will hold

a series of public meetings across the country that will serve as community forums. We need to hear from you: what are your needs? What will make Los Angeles and the Southern California area a better place to live and work? How can we help build community here through the arts?

I look upon the upcoming question and answer period as an opportunity for you to tell me how we can help make a dream become reality. I am certain that all of you hope to see Los Angeles flower into a cultural oasis.

My hope for the discussion to follow and in community forums across the country in 1991 will be to try to encourage the development of a wide range of activities so that all may take an active part in the cultural life of their community with a broad view of helping bridge difference. I'm asking you, just as I will ask folks from other geographic areas, what do you want and need in terms of cultural activities to make your community a better place to live. How can we help facilitate a coming-together of the artistic community in Los Angeles, so that you can build unity here through the arts?

We've handled all of the controversy, the media, Congress, the public, the Right, the Left, and all the other pressures as best we could over the past year. Sure, we've made mistakes, but we've learned as well,

and we'll continuing learning. Tonight, let's take the first steps toward building consensus, partnership, community to make Los Angeles vibrant with a rich and varied artistic life.

Thank you.

Exhibit D to Cole Declaration

MB 3135-0087
Expiration Date 3/31/93

ADDENDUM E

ADDITIONAL TERMS & CONDITIONS FOR
ORGANIZATIONS RECEIVING SUPPORT
FOR SUBGRANTING
(Revised May 1991)

Because your grant involves subgranting with Endowment funds the following terms and conditions pertain to your grant in addition to the "General Terms" referenced in your grant award letter:

A. None of the funds included in your approved project budget for support of your subgranting activity can be used for the purpose of awarding subgrants until you receive written notification from the Endowment's Grants Office that your subgrant recommendations have been approved. This prohibition applies to the use of federal and nonfederal project funds.

B. No announcements of subgrants may be made prior to your receiving written notification from the Endowment that your subgrant recommendations have been approved.

C. Subgrant recommendations and related information must be submitted at least 60-calendar days prior to the grant end date. Failure to provide the necessary information within the required time frame will result in the Endowment withdrawing any funds remaining on your grant.

However, if more time is needed to complete the project or submit this information, you may request a time extension as long as it is received at least 60-calendar days prior to the grant end date.

D. The information you submit must be in the format outlined on pages three and four to these additional terms and conditions; contain the information identified below; and be sent to the program through which your grant was awarded:

- o grantee name/grant number/award amount;
- o a description of the direct grant project/ activity;
- o a description (limit to one paragraph) of the actual selection process (including dates of significant steps in the selection process) with any noteworthy issues raised highlighted;
- o a listing and/or description of the review criteria against which subgrant applications were evaluated;
- o the names and primary professional affiliations of panelists, jurors, others involved in making the subgrant recommendations;
- o identification of the number of applications received and the number of subgrants recommended;
- o a list of the specific subgrant recommendations including the subgrantee name, address (city and state only), the amount of

their subgrant, and a description of the project or activity being supported; and

- o a certification that you will require final reports from your subgrantees.

[NOTE: While not part of this submission, the Endowment may subsequently request the application materials received from the subgrant applicants now being recommended for funding.]

E. You may request and receive Endowment funds to support the administrative activities or costs identified in your approved project budget as being necessary to make subgrant recommendations (pre-award costs). These costs may include guideline publications, panel costs, etc. The amount requested, however, may not exceed 35% of the Endowment's award. No funds may be requested for the awarding of subgrants or for post-award administrative costs (such as monitoring subgrantee activity, reviewing final reports, etc.) until the Endowment has reviewed and approved, in writing, the subgrant recommendations.

F. Subgrant recommendations and related information are subject to review and approval by the Endowment's Chairman. Once the Chairman acts on the recommendations, the Grants Office will inform you, in writing, of the outcome.

G. If a subgrant recommendation is rejected, you may request that your grant project budget be reduced to exclude sufficient nonfederal funds

to support the rejected subgrant outside of the Endowment-supported project. Under no circumstance can an Endowment-supported project include funds to support a rejected subgrantee; this applies to both federal and nonfederal funds.

H. Amendment requests that involve changes to previously approved subgrantees will be reviewed by the Chairman. These changes must be submitted to the program through which your grant was awarded along with supporting material documenting the change.

The Endowment will do everything it can to assist you in complying with these requirements. We encourage you to contact the program through which your grant was awarded regarding timing questions and any other information related to the activity of the grant. For other questions, you may contact the Grants Office directly at 202-682-5403.

FORMAT FOR GRANTEES TO PRESENT SUBGRANT RECOMMENDATIONS & RELATED INFORMATION TO THE NATIONAL ENDOWMENT FOR THE ARTS

Grantees must use the following format when presenting specific subgrant recommendations and related information to the National Endowment for the Arts.

1. Grantee Name/Grant Number/Award Amount.

2. A description of the direct grant project/ activity.

3. A description (limit to one paragraph) of the actual selection process (including dates of significant steps in the selection process) with any noteworthy issues raised highlighted.

4. A listing and/or description of the review criteria against which subgrant applications were evaluated.

5. The names and primary professional affiliations of panelists, jurors, others involved in making the subgrant recommendations, for example:

John Smith	Artistic Director A.B.C. Dance Company Pittsburgh, Pennsylvania
Jane Brown	Executive Director X.Y.Z. Theater Los Angeles, California
Hank Gray	Musician/Composer Tampa, Florida

6. Identification of the number of applications received and the number of subgrants recommended, as follows:

Number of applications received total_____.
Number of subgrants recommended total_____.

7. A list of the specific subgrant recommendations (in alphabetical order) including the subgrantee name, address (city and state only), the amount of their subgrant, and a description of the project or activity being supported, as follows:

Grantee Name — Amount of Subgrant
Address (City and State)

Description of subgrant project or activity being supported.

8. I certify that _____ (name of grantee) will require final reports from subgrantees supported by this grant.

_____
(Signature of Authorizing Official)

Exhibit E to Cole Declaration

May 1990

Constitutional Analysis of the FY90 Appropriations Obscenity Language

Julianne Ross Davis
General Counsel
National Endowment for the Arts

The constitutionality of the 1990 appropriations language can be challenged on three levels. First of all, the phrase "may be considered obscene" may constitute a prior restraint because the decision as to what is and is not obscene can arguably be made on work prior to its creation. The Arts Endowment cannot refuse to fund an application merely because it sounds like the applicant might create something that might be considered obscene by some. This amounts to a prior restraint and is unconstitutional. In addition, the appropriations language may include works that are not obscene but merely indecent. Indecent speech is protected by the First Amendment and therefore, the phrase "may be considered obscene" may be void for vagueness as well.

The second phrase that may not pass constitutional muster is "in the judgment of the Endowment". Leaving the determination as to whether or not a work is or is not obscene with the Endowment lacks the appropriate due process safeguards. Ordinarily, when an individual's First Amendment rights are affected, there are procedural due process safeguards in place to ensure that a citizen's constitutional rights are protected. Specifically, that citizen is afforded a hearing and an opportunity to present his or her side of

the story along with evidence and arguments to a jury of peers. Along with that right are the requisite appellate rights. The Endowment is not a regulatory agency and has none of these procedural safeguards in place. Although Section 954 (h) of our enabling legislation does provide for a hearing, there are no due process safeguards built into that reference. Moreover, there are no appellate rights anywhere in our regulations or enabling legislation. It is the Endowment's opinion that the government does not want to create another unnecessary regulatory agency. This would require another bureaucracy with lawyers and hearings officers. The courts are better equipped to make these determinations.

The phrase "in the judgment of the Endowment" also creates an additional problem because the Supreme Court's definition of obscenity necessarily requires the application of community standards. The standard for determining whether something is or is not obscene is found in Miller v. California, 413 U.S. 15 (1973). The three-part test for obscenity is 1) does the work appeal primarily to the prurient interest? 2) Is it patently offensive? and 3) Does it lack serious artistic, literary, political or scientific value?

The first two prongs of the Miller case require the application of community standards. It is impossible for the Endowment to determine whether a particular work will offend local standards in one community, some communities or all communities. The Supreme Court noted this very difficulty in Miller when it stated:

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should be or can be, fixed, uniform national standards of what precisely what appeals to the "prurient interest" or is "patently offensive". These are essentially questions of fact, and our nation is simply too big and too diverse for this court to reasonably expect that such standards could be articulated for all fifty states in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person applying contemporary community standards would consider certain materials "prurient" it would be unrealistic to require that answer to be based on some abstract formulation . . . . To require . . . a national "community standard" would be an exercise in futility. Id., at 30.

This statement was recently confirmed in Sable Communications v. FCC, 109 Sup. Ct. 2829 (1989). The Supreme Court allowed an FCC regulation prohibiting obscenity to stand but affirmed the necessity that the determination of obscenity be at the local community level. The court noted that the Miller

standards, including the contemporary community standards, apply to federal legislation and that possible purveyors of obscenity are subject to "varying community standards on the various federal judicial districts in which they transmit the materials." The court also noted that there is no "uniform national standards of obscenity."

Lastly, the phrase "including, but not limited to homo-eroticism, sadomasochism, sexual exploitation of children, or individuals engaged in sex acts . . ." may violate the Constitution for two reasons. First, the lead-in phrase "including, but not limited to" turns the test of obscenity to something much more subjective and may render the entire obscenity prohibition void for vagueness. In addition, the laundry list of depictions which are prohibited, with the possible exception of the phrase "sexual exploitation of children", in and of themselves are not necessarily obscene. Thus, the criteria has become too subjective and has strayed too far from the definition of obscenity outlined by the Supreme Court. This has created an instance where learned people of like mind could disagree on the application of the law.

Exhibit F to Cole Declaration

Exhibit F. John Frohnmayer, "Talking Points for 1st Amend. Congress, KC, MO"

[Exhibit F cannot be readily reproduced in a useful form in this format. Copies will be lodged with the Clerk of the Court.]

Exhibit G to Cole Declaration

National Endowment for the Arts [Seal omitted]
Washington, D.C. 20506

A Federal agency advised by the
National Council on the Arts

January 31, 1990

MEMORANDUM

TO: Theater Advisory Panel (Solo Performance Theater Artist and Mime Fellowship Section)

FROM: Jessica L. Andrews
Director
Theater Program

RE: Panel Meeting on February 22 & 23, 1990

Thank you for agreeing to serve on the Solo Performance Theater Artist and Mime Fellowship Section of the Theater Advisory Panel this year. We know that you have very busy schedules and really appreciate the time that you are giving to this process.

The material which follows this memo gives you the information that you will need before arriving in Washington. Even if you are a returning panelist, please read this carefully as there may have been some changes made.

The range and diversity of performance that occurs throughout the country is exhilarating. I am certain that this year's Solo Performance Theater Artist and Mime Fellowship review will be as productive as past ones, and that you will emerge from the experience pleased for having contributed to this rigorous and honorable process. Your participation is vital to us, and deeply appreciated by the profession. It is public service of a high order.

A few reminders: Please don't fall behind in the reading; do make notes; do call Eleanor Moncure whenever you have questions about applications (202/ 682-5425). It will save time at the table if some questions can be answered ahead of time.

The entire staff is looking forward to seeing you on February 22. Thanks again for participating.

INTRODUCTION

I'll begin by restating the Theater Program's mission as expressed in our Guidelines:

> The purpose of the Theater Program is to support the advancement of the art form. To this end, the Program encourages work in all forms and styles. It provides financial assistance for the creation of art works by professional artists, primarily in companies; for the development of the most talented individual artists; and for activities that improve the environment in which artistic excellence can occur.
>
> The Program takes a national perspective on the needs and condition of the theater field and attempts to plan for developments in future years.

The principal goals of the Program's financial assistance categories are:

- to improve the quality of theater art.
- to identify examples of the highest quality work to which all can aspire.
- to encourage free artistic expression.
- to expand the range of possibilities within which theatrical creativity functions.
- to augment opportunities for talented artists to work together.
- to develop new generations of talented artists.
- to make professional theater more widely available in areas not presently served.

A fundamental emphasis of the Program is to reward the highest artistic quality in whatever form it is found, without tilting in any one aesthetic direction. The Program seeks the widest possible boundaries for theater in order to support the best the art offers in all its varied forms. Most applications are submitted by artists and organizations working in familiar ways. But there are many other kinds of possible applicants including mime companies, puppet theaters, and circuses. This diversity is encouraged and welcomed.

THE PANEL'S RESPONSIBILITIES

This section of the Advisory Panel is responsible for recommending grant awards in the Program's Solo Performance Theater Artist and Mime Fellowship category. All panel recommendations are based on a fully competitive application review, and are not meant to focus on any particular taste or aesthetic. Rather, these recommendations should reflect a consensus decision that recognizes the highest artistic quality in whatever form it presents itself.

We are not secretive, and do everything possible to let applicants know what the Panel was thinking in recommending—or not recommending—their fellowship. To do that fairly, we return to our panel notes throughout the year. An off-the-cuff comment by the panelist—made weeks or months after the meeting—may not accurately match the full panel's reasons for voting in a particular way. So to avoid confusion and honor everyone's confidentiality, please keep the closed sessions entirely private. We understand how difficult this can be when you are con-

fronting a close colleague or long-standing friend who is concerned about a particular grant. We have all been through that very awkward experience, but it really is best to say that you don't remember all the specifics, and that the applicant should call the Theater Program for details. All material that we provide to you in advance of the meeting is, however, solely for that purpose and should not be shown to others, copied, or converted to any other use.

CONFLICT OF INTEREST

Appointment to the Panel is an invitation to statesmanship. The integrity of the process must be protected, not only by the Endowment's conflict of interest rules, but also by your own sense of propriety. No panelist is permitted to discuss an applicant who has a current financial arrangement with the panelist or panelist's organization; has a future financial arrangement; or has recently completed an arrangement.

Obviously, the entire process puts great pressure on you, the panelist, to rise above your own particular interests or tastes—to represent the field as a whole. Panelists are chosen with aesthetic, cultural, and geographic diversity in mind, so that the Panel as an entity will be fair to the entire field while still imposing a strict standard of excellence.

As a public agency, the Endowment must ensure that due process is followed, as established by the published Guidelines. Accordingly, strict conflict of interest rules are enforced; any criteria other than those published are excluded from consideration; and we take great pains to provide you with accurate information. Please read the Standards of Conduct document (which follows this memo) very carefully.

Following the Standards of Conduct document in this book is a Conflict of Interest documentation form. Please fill it out and return this to us as soon as possible. You must sign it again at the meeting.

SOURCES OF INFORMATION

Only three sources of information may be brought to bear on the Panel review of applications. First, of course, is the application itself and its supporting materials. Second, and most important, is your own expert knowledge of the applicants under review. Third are the site reports. As always, gossip and rumor play no role in this process.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT
OF CALIFORNIA

No. CV 90-5236 AWT (Kx)

KAREN FINLEY, JOHN FLECK, HOLLY HUGHES, TIM MILLER, AND NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS

v.

NATIONAL ENDOWMENT FOR THE ARTS, AND JOHN E. FROHNMAYER, IN HIS OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS

DEFENDANTS' STATEMENT OF GENUINE ISSUES OF MATERIAL FACT IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Pursuant to Local Rule 7.14, defendants hereby file their statement of genuine issues of material fact in opposition to the plaintiffs' motion for summary judgment on Count VI of the Amended Complaint, which challenges the constitutionality of 20 U.S.C. § 954(d). Although there are fundamental issues of disputed fact, as explained below, the defendants nonetheless agree that there are no "genuine issues" of fact precluding summary resolution of Count VI pursuant to Fed. R. Civ. P. 56 because the plaintiffs' factual assertions are unsupported.

In their Memorandum Of Points and Authorities and their Statement of Uncontroverted Material Facts, the plaintiffs repeatedly assert that the National Endowment for the Arts ("NEA") has adopted a policy of conducting grant-by-grant assessments of whether an applicant's work satisfies "general standards of decency" and demonstrates "respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d). In fact, the NEA has no such policy, but has fulfilled its obligation to implement § 954(d) by adopting various practices to diversify the peer panels that initially review and make recommendations on grant applications. See 20 U.S.C. § 959(c). The variety of cultural, artistic and ethnic views on each panel ensures that the panels' recommendations inherently will reflect the variety of values and sensibilities that exist throughout society.

These factual differences need not be tried, however, because there is no "genuine issue" about how the NEA has implemented the statute. Plaintiffs' description of the NEA's policy is factually unsupported; none of their declarations or exhibits purports to provide a definitive description of the NEA's practices, but simply assumes that the agency will "grant or withhold government benefits" based on the agency's assessment of the "decency" of an applicant's work. See Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment at 1.

Although no genuine issues of fact preclude summary resolution of Count VI, there are several other uncontrovertible facts relevant to the resolution of plaintiffs' motion for partial summary judgment and defendants' motion for judgment on the pleadings as it

relates to Count VI of the Amended Complaint. Those additional facts are set out below.

STATEMENT OF FACTS

1. In November, 1990, Congress substantially amended the NEA's enabling legislation. One of those amendments directed the Chairman to establish regulations and procedures to ensure that:

> artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. § 954(d) (emphasis added).

2. Since § 954(d) was amended, three of the five plaintiffs challenging this provision (Holly Hughes, Tim Miller, and the National Association of Artists' Organizations ("NAAO")), have applied for and received NEA grants totalling $51,250. Exhibits A, B, C, and D (grant letters).[1]

3. NEA panelists are not directed to make a determination about the decency of the art work that the applicant has done or proposes to do, apart from their judgment of the proposal's artistic merit. Rather, as the guidance provided to panelists makes clear, the Endowment expects that each panelist will base his or her recommendation only on the artistic

[1] Plaintiff John Fleck has applied for a FY 1992 grant from the Endowment, see Exhibit E, and plaintiff Tim Miller has applied for another grant in FY 1992. See Exhibit F. Karen Finley, the only plaintiff who has not applied directly for a grant since § 954(d) was amended, received indirect NEA support in FY 1991. See Exhibit G.

merit and excellence of each application. Exhibit H, ¶ 4 & Attachment 1; Exhibit I; Exhibit J at 33-34.

4. The Endowment has not undertaken any policy, practice or procedure to review ongoing grants for compliance with § 954(d), nor does it require subgrantees to make decency assessments of subgrantees' art work before awarding subgrants. Exhibit L, ¶ 7(b).

6. Pursuant to 20 U.S.C. § 959(c), grantees are required to submit reports on Office of Management and Budget forms, which include financial statements, a general description of the work, and in some cases, a copy of the product. 20 U.S.C. § 959(d)(2); Exhibit M, Attachments 1-3. These reports are reviewed by Program Offices within the NEA to determine whether grantees carried out the activities and projects for which the grant funds were awarded, and whether they did so with an acceptable level of quality. Exhibit M, ¶ 7. The Endowment does not have any policy, procedure or practice of using these reports to assess compliance with the "decency" clause of § 954(d). Id. at ¶ 12.[2]

[2] In their declarations, the plaintiffs additionally refer to three examples of the Endowment's alleged harassment of grantees for addressing controversial matters in their grant projects which, they then argue, demonstrate how the "decency" provision is or could be abused by the NEA. See Finley Decl. ¶ 12; Murphy Decl. ¶ 16. The plaintiffs misstate the facts regarding all three examples, as to two of which they wholly lack personal knowledge. Most importantly, none of the examples cited involved agency action taken pursuant to the "decency" provision or any other part of § 954(d). Because these examples are wholly unrelated to the issues before the Court, they are not addressed in detail here. However, an accurate record of the agency's actions concerning these three

Respectfully submitted,

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grants may be found in Exhibit M ¶¶ 13-18, and Exhibit H ¶ 11.

DECLARATION OF RANDOLPH McAUSLAND

I, Randolph McAusland, do hereby declare as follows:

1. I am the Deputy Chairman for Programs at the National Endowment for the Arts ("NEA"). I have held this position since June 1990. My responsibilities include oversight of the peer panel review process by which recommendations for funding are made in the Theater and 13 other Endowment programs. In that regard, the Chairman delegated to me the responsibility for initially reviewing and approving the composition of peer review panels.

2. In November 1990, following the enactment of the so-called "decency" provision of the NEA's enabling legislation (20 U.S.C. sec. 954(d)), the Chairman, with the concurrence of the National Council on the Arts, determined that the NEA would implement that provision by ensuring that the peer review panels represent a variety of geographical areas, aesthetic views, professions areas of expertise, races and ethnic groups, and gender, and include a lay person. This method of implementation was based on the conclusion that the recommendation of peer review panels comprised of panelists with diverse backgrounds inherently would reflect the diverse values and sensibilities of the American public.

3. Consistent with this decision and with the provision of the NEA's enabling legislation governing peer review (20 U.S.C. section 959(c)), the Endowment has implemented steps to ensure that panels have a diverse composition. These include such goals as ensuring that most panels consist of at least nine

persons, including residents of each of six geographic regions; that panels are evenly split between men and women; that 20-25 percent of panelists are members of identifiable racial minority or ethnic groups; that each panel is composed of persons with a variety of aesthetic perspectives and occupations within the arts (i.e., critics, academics, artists, presenters); and that each panel include one lay person. I personally review all proposed panels to ensure that they are sufficiently diverse. I reject approximately one out of five proposed panels for inadequate diversity.

4. When a panel convenes to review applications, either the Chairman or I address panel members as part of their orientation. Among other things, I explain section 954(d)(1) and the NEA's implementation of it. I typically begin by reading that provision, which states in relevant part:

> artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

I then explain that the NEA interprets this provision as a whole; that is, that artistic excellence and merit are the criteria upon which grant awards should be based. Therefore, I explain, each panelist should be guided ultimately by his or her conclusions as to the artistic merit and excellence of a proposed grant project or work, and that the NEA, by ensuring diverse membership on the panels, had fulfilled its mission under the statute of "taking into account" diverse standards and values. Because the statute must be read as a whole, neither the Chairman nor I ever instruct a panel to make a separate determination as to whether an application is decent or respectful.

5. Attachment 1 to this declaration consists of excerpted pages from the orientation of the panel that reviewed applications to the 1991 Theater Program Professional Companies category. The Chairman addressed this panel. His remarks are typical of the presentation we both make concerning section 954(d).

6. In my capacity as Deputy Chairman for Programs, I also am responsible for overseeing the drafting of Guidelines for each funding category within my jurisdiction. A few of these Guidelines, including those for the Solo Performance Fellowship grants, state that the NEA will consider an applicant's "body of work" in making funding decisions. Applicants typically satisfy this requirement by listing the titles of their projects, the places they have performed or exhibited, the dates on which they wrote, performed or exhibited the projects, and providing similar information in their applications.

7. This information is limited to projects, performances or work within the relevant field. In other words, if an individual who has applied for a playwright fellowship in the Theater program also paints, the panel considering playwright fellowships does not review the applicant's "body of work" as a painter.

8. Panels consider information pertaining to an applicant's relevant "body of work" to assess the applicant's standing and significance in the relevant field. Based upon the statute taken as a whole, there is no policy or practice of reviewing the content of an applicant's "body of work" to make a determination as to whether the applicant has produced "indecent" or "disrespectful" art.

9. Similarly, when site visitors prepare site visit reports for the review panels, they are primarily concerned with the performance they reviewed. Site visit reports typically discuss an applicant's "body of work" only in terms of where the applicant has performed, the works that he or she has performed, how the works were received, and the applicant's reputation. The Endowment does not solicit an opinion as to whether the applicant's "body of work" contains work that is or could be considered indecent.

10. Charlotte Murphy, Executive Director of plaintiff National Association of Artists' Organizations ("NAAO"), states in paragraph 16 of her declaration that the so-called "'decency' amendment has also caused the NEA to monitor the use of grants in ways that are chilling artistic freedom and intimidating grant recipients." However, I am aware of no Endowment policy or procedure which requires the NEA to monitor on-going or completed grants for compliance with the "decency" language in section 954(d); the monitoring which is done (to assure compliance with the terms and conditions of the grant) is described more fully in the declaration of Laurence Baden, Deputy Chairman for Administration.

11. Additionally, as an example, Ms. Murphy states that the NEA "investigated the use of grant funds by another NAAO member, a gallery in San Diego, for a public art project whose theme was police brutality." The grantee to whom Ms. Murphy refers is Installation Gallery. As Deputy Chairman for Programs, I am familiar with the NEA's actions regarding this grantee. The Endowment received an inquiry as to whether the grantee had misused grant funds. Upon review of the grantee's final report, we confirmed that it had used the funds to support a

project that corresponded to that described in its application and grant letter, and that nothing improper had occurred. Neither the inquiry received by the NEA nor the agency's conclusion regarding this grantee were related in any way to any concern that the grantee's project was "indecent" or "disrespectful" or that it failed to conform to section 954(d).

I swear upon penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

1/2/92
DATE

/s/ RANDOLPH MCAUSLAND
RANDOLPH MCAUSLAND

Attachment 1

Excerpt of 1991 Theater Program
Professional Companies Panel

Introductory Remarks

Speaker: This is John Frohnmeyer, Chairman of the National Endowment for the Arts.

(Inaudible)

(Introductions)

Speaker: I'm sorry for the conditions but at least the weather is nice outside. I hope we get a break sometime. I'm here for just a couple of reasons. One of them is just to thank you for being here and giving your time. Doing the Endowment's work is critical, as I think all of us appreciate that the panels do the hardest process and you're it, and I thank you for your time and your effort to do this work.

The second thing is just to run briefly through the legislation that governs us this year and answering questions you might have on it. It says that you make your decisions on the basis of artistic merit and artistic quality, taking into consideration the general standards of decency and the diverse values of

the American people. What that means in terms of how we have interpreted that language is that you're it. We put together a panel that broadly represents diverse areas of the country, both (inaudible) cultural background of the country, and you bring to the table those values that the statute states. I don't really have any more to say about it than that unless you want to talk about it.

The third thing, if you wouldn't mind just taking a couple of minutes with me, I would just like to hear what's on your mind individually or collectively, from what you see going on out in the world of theater where you are. What the major issues are or something that we from the national perspective, can help with.

SECOND DECLARATION OF CHARLOTTE MURPHY

I, Charlotte R. Murphy, do hereby declare as follows:

1. I am the Executive Director of the National Association of Artists' Organizations (NAAO), which is a plaintiff in this case.

2. Among NAAO's members are individuals and organizations which have applied for NEA grants and have been denied grants since the "decency" restriction being challenged in this lawsuit took effect.

3. Those NAAO members which have been denied grants since the restriction took effect have no way of knowing whether their denials were based in whole or in part on considerations of "decency" because the denial letters issued by the NEA do not state the reason for the denial.

Signed under penalties of perjury this 24th day of January, 1992.

/s/ CHARLOTTE R. MURPHY
CHARLOTTE R. MURPHY

In the Supreme Court of the United States

No. 97-371

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

Filed: Nov. 26, 1997

ORDER GRANTING CERTIORARI

The petition for a writ of certiorari is granted. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before, 3 p.m., Friday, January 9, 1998. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 6, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 6, 1998. Rule 29.2 does not apply.